APPENDIX A

Opinion of the Court Below

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 363-364—September Term, 1965.

(Argued March 31, 1966 Decided August 29, 1966.)

Docket Nos. 30321-2

FEDERAL MARITIME COMMISSION,
Petitioner-Appellee,

and

LUDLOW CORPORATION,
Intervenor-Appellee,

v.

A. T. DESMEDT, President, AMERICAN EXPORT ISBRANDTSEN LINES, INC., AMERICAN EXPORT LINES, et al.,
Respondents-Appellants.

Before:

WATERMAN, MOORE and FRIENDLY,
Circuit Judges.

Separate petitions to the United States District Court for the Southern District of New York by Federal Maritime Commission and Ludlow Corporation to enforce subpoenas *duces tecum* directed to appellants were consolidated for hearing there. Upon hearing the court, Ryan, *Ch. J.*, in an opinion reported at 249 F. Supp. 496 (1966), ordered enforcement. Enforcement order affirmed.

Opinion of the Court of Appeals

DAVID L. ROSE, Atty., Department of Justice; J. William Doolittle, Acting Asst. Attorney General; Robert M. Morgenthau, U. S. Attorney; Jack H. Weiner, Attorney, Department of Justice; James L. Pimper, General Counsel, H. B. Nutter, Acting Solicitor, Federal Maritime Commission, *for Federal Maritime Commission;* Peter J. Nickles, Covington and Burling, Washington, D. C., *for Ludlow Corporation, Appellees.*

JOHN WILLIAMS, KIRLIN, CAMPBELL & KEATING, ELMER C. MADDY, New York City, *for Respondents-Appellants.*

FRIENDLY, *Circuit Judge*:

This action was commenced in the District Court for the Southern District of New York by the Federal Maritime Commission (hereinafter the Commission) to enforce subpoenas *duces tecum* issued pursuant to Section 27 of the Shipping Act of 1916, 46 U. S. C. § 826,[1] to Respondents-Appellants (hereinafter Respondents). Each of the respondents is either an officer or an agent of certain common carriers by water, which in turn are all members of the Calcutta, East Coast of India and East Pakiston/U. S. A. Conference (the Calcutta Conference) engaged in the transportation of commodies by water from East India and Pakistan ports to United States Atlantic and Gulf of Mexico ports.

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[1] The section provides in relevant part as follows:

> "For the purpose of investigating alleged violations of this chapter, the Federal Maritime Board may by subpoenas compel the attendance of witnesses and the production of books, papers, documents, and other evidence from any place in the United States at any designated place of hearing. . . ."

On July 6, 1965 the Calcutta Conference filed with the Federal Maritime Commission notice of a general across-the-board rate increase to become effective as of October 11, 1965. Shortly thereafter Ludlow Corporation, a shipper of jute and jute products from Indian ports served by the Calcutta Conference and obligated by virtue of a dual-rate contract to ship all of its imports with member carriers, filed a formal complaint with the Commission pursuant to Section 22 of the Shipping Act, 46 U. S. C. § 821. The complaint alleged that as of October 11, 1965—the effective date of the Calcutta Conference rate increase—Ludlow faced the payment of ocean transportation rates on certain jute products that were in violation of § 18(b)(5) of the Shipping Act of 1916, 46 U. S. C. § 817(b)(5), as "so unreasonably high . . . as to be detrimental to the commerce of the United States"; of § 15 of the Act, 46 U. S. C. § 814, in that the Calcutta Conference's rate-fixing agreement was being so used as to "operate to the detriment of the commerce of the United States" and "to be contrary to the public interest"; and of § 14b of the Act, 46 U. S. C. § 813a, in that the Calcutta Conference's dual-rate agreement was being so used as to be "detrimental to the commerce of the United States" and "contrary to the public interest"[2]

Ludlow first unsuccessfully attempted to secure from the members of the Calcutta Conference on a voluntary basis information it believed relevant to the reasonableness of the increased rates. Thereafter Ludlow applied to the Commission for issuance of subpoenas pursuant to § 27 in order to compel production of this information. This application

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[2] Section 14b legalizes conference use of the dual-rate contract provided that Commission permission be obtained and that the "use of such contract" does not contravene certain standards set forth in that section, including the "detriment to commerce" and the "public interest" standards also found in § 15. See *F. M. C.* v. *E. C. Caragher*, — F. 2d — (2 Cir. 1966).

was granted by the Hearing Examiner on October 18, 1965. Each subpoena was identical in scope and required production for the period covering January 1, 1963 through June 30, 1965 of all records establishing: (1) the total revenue tons of cargo carried; the total gross and net freight revenue earned; the total revenue tons of "Jute Backing" for tufted rugs and Jute Mesh in rolls," "Jute bagging for cotton bales covering only, "Jute Yarn," and "Jute Webbing" carried; and the gross and net freight revenue earned from the carriage of these jute commodities; (2) a list of the fifteen commodities carried in the largest volume of revenue tons; the number of revenue tons of each such commodity; a statement of the gross and net freight revenue earned from each; the costs, stated separately, for stevedoring, cargo handling, brokerage fees, and cargo commissions at each of the ports served by the member line's vessels in the covered trade; and whether any of these costs had changed during the relevant period; and (3) the total usable but unused free space available on vessels operated by the member line in the covered trade. For the period covering January 1, 1964 through June 30, 1965 the subpoenas also required production of all records establishing: (1) the rates applicable to the carriage of cargo, and vessel operating costs, including costs of stevedoring, cargo handling, brokerage fees and other commission; and (2) all correspondence between the member lines concerning policies or principles, or instructions with respect to determining the level of freight rates in the trade covered, both in general and on specific commodities moving in the trade.[3]

On October 19, 1965 the Hearing Examiner issued a "Clarification of Ruling on Application for Subpoena Duces Tecum" to the effect that his initial ruling was not to be

[3] The subpoenas did not require production of original documents; they could be satsfiied with copies of or compilations from the records.

construed "to require production of documents from any place not in the United States," because Commission policy required that the Commission itself pass on all requests for documents located abroad. Ludlow then applied to the Commission for issuance of subpoenas relating to documents not in the United States and the application was granted on November 12, 1965.

A hearing on the underlying investigation was scheduled for December 7, 1965 to give respondents time to collect the subpoenaed materials. On December 2, 1965, respondents informed the Hearing Examiner they would not comply with the subpoenas. When hearing was held on December 7, 1965 and respondents failed to appear and produce the materials subpoenaed, the hearing was recessed indefinitely and the Examiner certified to the Commission the fact of respondents' noncompliance. Both Ludlow and the Commission, pursuant to § 29 of the Shipping Act, applied to the court below for enforcement of the subpoenas.[4]

The district court, having first consolidated the two enforcement proceedings, directed full compliance with the subpoenas, see 249 F. Supp. 496. It held that the requirement of § 27 that there be an "alleged violation" of the Shipping Act of 1916 was satisfied by Ludlow's complaint, which alleged that certain practices of the Calcutta Conference violated the standards established by §§ 14b, 15, and 18(b)(5) of the Act. It held that § 27 authorized the Commission to subpoena documents wherever located, and that the words "from any place in the United States" were designed to expand the Commission's subpoena power beyond the territorial limits once imposed by the Judicial Code

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[4] Ludlow was allowed to intervene in the enforcement proceeding brought by the Commission. The separate enforcement proceeding brought by Ludlow was consolidated with the proceeding brought by the Commission, rendering moot the question of Ludlow's standing to seek enforcement.

and presently by Fed. R. Civ. P. 45(e), rather than to restrict the Commission's subpoena power to documents located in the United States. It also held respondents had not objected to relevancy in a timely fashion at the administrative level and, therefore, could not raise that objection before a court. From the order directing compliance with the subpoenas, respondents appeal. We affirm.

We need spend little time on several of respondents' contentions. The claim that the Commission lacked § 27 subpoena power in the investigation that has given rise to this proceeding because the practices of the Calcutta Conference, which Ludlow alleged to transgress the standards established by §§ 14b, 15, and 18(b)(5), are not in terms stated in the Shipping Act to be "unlawful," or "violations" of that Act, is substantially the same point unsuccessfully urged in *Federal Maritime Commission* v. *E. G. Caragher*, —— F. 2d —— (2 Cir. 1966). To be sure, in contrast to *Caragher*, the rates here are challenged as unreasonable and contrary to the public interest by a shipper rather than by a competing carrier, and they are claimed to be unreasonably high rather than unreasonably low. But these are distinctions without a difference; the 1916 Shipping Act and the 1961 amendments were designed to benefit both shippers and carriers. See Note, Rate Regulation in Ocean Shipping, 78 Harv. L. Rev. 635 (1965). The only other distinction, that here the investigation into the rates charged by a conference was instigated by the filing of a formal complaint with the Commission by an aggrieved party, whereas in *Caragher* the Commission commenced an investigation on its own motion after receiving an informal complaint, also should not lead to any difference in result; as we explained in *Caragher*, —— F. 2d at ——, § 22 expressly gives the Commission identical powers, "except as to orders for the payment of money," in proceedings instituted upon its own motion and in proceedings begun by complaint. These considerations likewise dispose of respondent's argu-

ment that the documentary evidence subpoenaed by the Commission is not relevant to the underlying investigation since the Commission does not have the power to establish reasonable rates for the foreign water commerce of the United States, as it does under § 18(a) of the Act for interstate water commerce. The Commission is directed to disapprove unreasonable rates, and cost data and revenue information are highly relevant to that issue. *Far East Conference* v. *Federal Maritime Comm'n*, 337 F. 2d 146, 150-51 (D. C. Cir. 1964), cert. denied sub nom. *Pacific Coast European Conference* v. *Federal Maritime Comm'n*, 379 U. S. 991 (1965).[5]

The remaining contention, that the Commission is without power to issue a subpoena requiring the production of evidence from outside the United States, is surprising as a matter of common sense. If an ocean shipping line, American or foreign, was defending an ordinary civil action in a district court for damages to persons or property, or prosecuting a suit for unpaid freight, it could not resist discovery under F. R. Civ. P. 34 or obtain the quashing of a subpoena *duces tecum* under F. R. Civ. P. 45 simply on the ground that the desired records were abroad; is would have to show inability to comply for some compelling reason, such as a prohibition of production by a foreign government. Cf. *Societe Internationale* v. *Rogers*, 357 U. S. 197 (1958). The same would be true as to a proceeding before a grand jury, see *In re Investigation of World Arrangements with Relation to the Production, Transportation, Refining and Distribution of Petroleum*, 13 F. R. D. 280, 286 (D. D. C. 1952), or before the Internal Revenue Service under § 7602 of the Code, see *First Nat'l City Bank* v. *I. R. S.*, 271 F. 2d 616 (2 Cir. 1959), cert. denied, 361 U. S. 948, petit. for rehearing denied 362 U. S. 906 (1960). In-

[5] We therefore have no occasion to determine whether the issue of relevancy was raised before the Commission in a timely manner.

deed, if the Commission had chosen to proceed in this case under § 21 of the Shipping Act, it could have required that substantially the same information sought in these subpoenas be furnished from foreign countries. See *Kerr S.S. Co. v. United States*, 284 F. 2d 61, 63-64 (2 Cir. 1960), appeal dismissed, 369 U. S. 422 (1962); *Montship Lines, Ltd.* v. *F. M. B.*, 295 F. 2d 147, 153-54 (D. C. Cir. 1961). It thus requires rather strong evidence to show that Congress wished to render an agency responsible for regulating an important segment of the foreign commerce of the United States powerless to require by subpoena that residents of this country and non-residents doing business here should produce relevant documents simply because these are kept outside our borders.

Respondents argue that the clause in § 27 authorizing the agency by subpoena to "compel the attendance of witnesses and the production of books, papers, documents, and other evidence from any place in the United States at any designated place of hearing," see fn. 1, has such a plain meaning that we must perforce attribute to Congress a deep-seated intention to reach this irrational result. Faced with the oft-cited decision of *SEC* v. *Minas de Artemisa, S. A.*, 150 F. 2d 215 (9 Cir. 1945), see also *Mines & Metals Corp.* v. *SEC*, 200 F. 2d 317, 320 (9 Cir. 1952), cert. denied, 345 U. S. 941 (1953), construing a similar provision in § 19(b) of the Securities Act of 1933 as authorizing the SEC to require a resident to produce papers from a foreign country, they contend that case was wrongly decided since the court was in error, as was the district court here, in assuming that the phrase "from any place in the United States" was needed to overcome the territorial limitations of what was then 28 U. S. C. § 654, now F. R. Civ. P. 45 (e)— limitations applicable to court subpoenas but not to administrative ones enforced by a court. See *Bowles* v. *Bay of New York Coal & Supply Co.*, 152 F. 2d 330, 331 (2 Cir. 1945). The question is of importance since, as will later appear, respondents' argument would apply not only to the

Federal Maritime Commission and the Securities Exchange Commission, but to many other agencies, including the Interstate Commerce Commission, the Federal Trade Commission, the National Labor Relations Board, the Federal Power Commission, the Civil Aeronautics Board, and the Secretary of Agriculture.[6]

Respondents' "plain meaning" approach has long since ceased to have this court's adherence; Judge Learned Hand was not preaching novel doctrine when he instructed more than twenty years ago: "There is no surer way to misread any document than to read it literally." *Guiseppi* v. *Walling*, 144 F. 2d 68, 624 (1944) (concurring opinion), aff'd sub nom. *Gemsco, Inc.* v. *Walling*, 324 U. S. 244 (1945).[7] Courts of the United States are not, like Elsa in the Lohengrin legend, forbidden to ask whence something sprang; on the contrary, they are bound to seek out the source of a critical sentence of a statute, as we have recently done in *F. M. C.* v. *Caragher, supra.* "Where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived," Marshall, *C. J.*, in *United States* v. *Fisher*, 2 Cranch (6 U. S.) 358, 386 (1805). Such inquiry is particularly necessary when a literal reading produces an anomalous result; and courts are not relieved from their duty because counsel have rendered only scant assistance.

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[6] For at least two of these agencies—the Federal Communications Commission and the Civil Aeronautics Board—foreign commerce is a highly important head of jurisdiction.

[7] See his statement in 1933: "Thus it is not enough for the judge to use a dictionary. If he should do no more, he might come out with a result which every sensible man would recognize to be quite the opposite of what was really intended; which would contradict or leave unfulfilled its plain purpose." The Spirit of Liberty 106 (1960 ed.); and also *Cabell* v. *Markham*, 148 F. 2d 737, 739-40 (2 Cir.), aff'd, 326 U. S. 404 (1945).

As recognized in *Caragher*, § 27 of the Shipping Act of 1916 derived from the pioneer and at that time only federal statute regulating carriers, the Interstate Commerce Act.[8] Section 12 of that statute as originally enacted empowered the ICC "for the purposes of this act" to "require the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation"; to that end it authorized the Commission to invoke the aid of any court of the United States and directed the circuit courts, "in case of contumacy or refusal to obey a subpoena issued to any common carrier subject to the provisions of this act, or other person," to issue an order requiring such common carrier or other person to appear before the Commission and produce books and papers. 24 Stat. 383 (1887). Two years later Congress stiffened the Act in various respects; the relevant provision of § 12 was altered by making express what the original version had implied, namely, that the Commission shall have power to "require, *by subpoena,* the attendance and testimony of witnesses and the production of all books, etc." 25 Stat. 859 (1889).[9] It is plain that these provisions were sufficiently broad to have enabled the ICC to compel production of records from a foreign country if occasion had arisen.

The ancestor of the phrase in § 27 of the Shipping Act to which respondents attribute limiting significance made its

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[8] Congressman Alexander, the sponsor of the shipping legislation, explained on the floor of the House that:

> "The provision of Section 27 relating to the power of the board to compel the attendance of witnesses and the production of documents and other evidence are also substantially similar to those of the interstate commerce act . . ." 53 Cong. Rec. 8081 (1916). See also H. R. Rep. No. 659, 64th Cong., 1st Sess. 33 (1916).

[9] The amendment also authorized a party as well as the Commission to seek judicial aid in enforcing a subpoena.

first appearance in a further revision of § 12 of the Interstate Commerce Act in 1891, which also provided for the taking of testimony by deposition before various judicial or executive officers or notaries public. The power granted by the statutes of 1887 and 1889 to require the attendance and testimony of witnesses and the production of records by subpoena was left outstanding in all its breadth. But Congress inserted, immediately before the provision authorizing the invocation of judicial aid, a new sentence:

> "Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing." 26 Stat. 743-44.

Even if detailed legislative history were lacking, the context would make clear that the purpose of the amendment was to allay doubts rather than raise them. We are not, however, relegated to conjecture; history fully enlightens us as to the legislative purpose. The Commission's Annual Reports for 1889 and 1890 show that Congress was simply responding to requests by the agency to clarify that its subpoena power was not limited to requiring attendance within the district of a witness' residence.[10] Very likely,

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[10] "An amendment to the twelfth section, relating to the attendance of witnesses, and to the taking of testimony by deposition. Objection has been made that the attendance of witnesses can not be required outside of the judicial district in which they reside. The Commission believes the objection is not well founded, and that the law could not be effectually administered under such a rule. As the fact that the objection has been made indicates that obstructions and delays may occur, it is better that the language of the act should be open to no misconstruction." 3 ICC Ann. Rep. 108 (1889).

"It repeats the recommendation contained in the third annual report that the twelfth section be so amended as to make clear the obligation of witnesses to attend before the Commission in obedience to subpoenas regardless of the boundaries of judicial districts, and also that provision be made for the taking of testimony by deposition." 4 ICC ANN. Rep. 68 (1890).

as the Commission itself recognized, the addition was needless, since, as is now urged by respondents but perhaps was not so clearly apprehended when the first regulatory commission was still a fledgling, the territorial limits on district court subpoenas, then embodied in Rev. Stat. § 876, would not apply to subpoenas issued by an administrative agency. But the history makes it as "plain" as anything can be that the purpose of the new provision, which has had so large a progeny, was to enhance or confirm the powers of the ICC, not to thwart it by allowing parties to Commission proceedings to refuse to produce documents from foreign countries, a problem which was in no one's mind.

It would be wholly unrealistic, in the teeth of the legislative history, see fn. 8, to ascribe any substantive purpose to the drafting change whereby what had been stated in two sentences in § 12 of the Interstate Commerce Act [11] was compressed into one;[12] it is inconceivable that after granting full powers to agencies not having much need for procuring documents from abroad, Congress should have denied

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[11] The language of the Interstate Commerce Act had been used in § 9 of the Federal Trade Commission Act, 38 Stat. 722 (1914), 15 U. S. C. § 49. This, in turn, was incorporated by reference in the Packers and Stockyards Act of 1921, 7 U. S. C. § 222.

[12] Congress reverted to the two sentence formulation of the Interstate Commerce and Federal Trade Commission Acts in such statutes as § 19(b) of the Securities Act of 1933, 15 U. S. C. § 77s(b), § 21 of the Securities Exchange Act of 1934, 15 U. S. C. § 78u(b), § 409 of the Federal Communications Act of 1934, 47 U. S. C. § 409, § 11 of the National Labor Relations Act of 1935, 29 U. S. C. § 161, § 307 of the Federal Power Act of 1935, 16 U. S. C. § 825(f), and § 1004 of the Civil Aeronautics Act of 1938, 52 Stat. 1021, now § 1004 of the Federal Aviation Act, 49 U. S. C. § 1484. The rather obvious reason was the greater familiarity of the legislators with the Interstate Commerce and Federal Trade Commission Acts than with the Shipping Act, which had been little used. See Note, *supra*, 78 Harv. L. Rev. at 640.

them to one that did—particularly when it placed no such limit on § 21. Congress has said, plainly enough for all to understand, that the Federal Maritime Commission, like the Interstate Commerce Commission, the other regulatory agencies, and the federal courts, can require a resident by subpoena to produce documents under his control wherever they are located, and that, unlike the courts, the agencies can require their production at a place far from home.

Respondents' further arguments based on legislative developments long subsequent to the 1916 enactment are lacking in force. One of these concerns the Merchant Marine Act of 1936. When that statute was passed, the section that empowered the Maritime Commission to conduct investigations pursuant to that Act provided that the Commission was:

> . . . empowered to subpoena witnesses . . . and require the production of any books, papers, or other documents which are relevant or material to the matter under investigation. Such attendance of witnesses and the production of such books, papers, or other documents may be required from any place in the United States or any Territory, district, or possession thereof at any designated place of hearing within the Federal judicial district in which the witness resides. Merchant Marine Act of 1936, ch. 858, § 214(a), 49 Stat. 1991.

At the instance of the Commission this section's restriction on the place of hearing was deleted by amendment in 1938. The Senate Report urging amendment stated:

> The Commission is given power by section 214(a) of the present act to subpoena witnesses for the purpose of any investigation which it may conduct. The attendance of witnesses, however, may only be

required within the Federal judicial district in which the witness resides. The amendment removes this limitation.

Authority to require the attendance of witnesses at any place designated by the Commission, enabling it to conduct investigations in the city of Washington when desired, is granted to the Commission by section 27 of the Shipping Act, 1916. Similar power has been granted to the Interstate Commerce Commission, the Federal Trade Commission, and the National Labor Relations Board. No reason appears for a restriction on the authority of the Commission to require the attendance of witnesses for the purposes of any investigation which it may conduct under the provisions of the Merchant Marine Act. The restriction is therefore removed by the amendment. S. Rep. No. 618, 75th Cong., 3d Sess. 6 (1938).

See also Hearings on H. R. 8532 Before the Committee on Merchant Marine and Fisheries, 75th Cong., 2d & 3d Sess. 5 (1938). All that we derive from this is that the "from any place in the United States" language in the 1936 Act was borrowed from the many earlier acts that have been cited, and that the amendment placed hearings under the Merchant Marine Act on the same basis as those under the Shipping Act and other federal regulatory statutes.

Neither can we give significant weight to the failure of Congress, in the legislation of 1961 concerning the dual-rate problem, to adopt recommendations of the Department of Commerce and the Federal Maritime Board which would have made the applicability of both § 21 and § 27 to documents located abroad clear beyond peradventure. These recommendations stemmed from the attack on the applicability of § 21 to documents located abroad which was then pending before the Court of Appeals for the District of Columbia in the *Montship* case and was resolved by it in

the Board's favor before the Senate considered the House bill. See Legislative History of the Steamship Conference/Dual Rate Law, S. Doc. No. 100, 87th Cong., 2d Sess. 134, 136-37, 138-39 (1962). The bill passed by the House amended § 15 to provide that no agreement between carriers should be approved unless it contained "provisions that every signatory shall provide records or other information, wherever located, required by any order of the Board which contains the minimum notice provisions required by the Administrative Procedure Act," and similarly amended § 21. *Id.* at 161.[13] This was recognized as going considerably beyond a clarification of §§ 21 and 27 since it would require a foreign shipping line to pledge the availability of documents irrespective of any orders its own government might give, *id.* at 141-44; the Department of State proposed that if the Congress was unwilling to rely on a solution through diplomatic channels "because of its conviction that documents, wherever located, must be made available," the revision of §§ 15 and 21 should be "deferred while the matter is thoroughly explored to determine how this Government can secure the cooperation of foreign governments in a program which will provide the Federal Maritime Board with the information essential to the performance of its responsibilities." *Id.* at 143-144. See also Hearings on Steamship Conference/Dual Rate Bill, H. R. 6775, Before the Merchant Marine and Fisheries Subcommittee of the Senate Committee on Commerce, 87th Cong.,

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[13] The House bill as introduced, H. R. 4299, contained an amendment to § 15 providing that no agreement should be approved unless the signatories agreed to "provide records or other information, wherever located, required by any proper order of the Board issued under section 21 hereof" but did not amend § 21, see Legislative History, *supra* at 61. A revised bill included an amendment of the latter, *id*, at 84, and the two amendments were carried into H. R. 6775 which was favorably reported and voted. *Id.* at 91, 97-98; 104, 111; 161, 163. See House Report, *id.* at 121.

1st Sess. 587-88 (1961). It was this change and this alone that was eliminated by the Senate Committee, see Rep. No. 860 in Legislative History, *supra,* at 223-24, with the subsequent concurrence of the Senate [14] and of the House. We read this history as indicating only a desire by Congress to leave the agency's powers to require production of documents located abroad to extend however far the courts might decide under the existing statute, neither adding thereto nor subtracting therefrom; the lack of intention to renounce power to obtain documents from abroad is implicit in the recognition that the courts of appeal had already upheld the actions taken by the agency under § 21, *id.* at 224, and the refusal to overrule these decisions by amendment. The Supreme Court has warned against drawing an inference "that an agency admits that it is acting upon a wrong construction, by seeking ratification from Congress. Public policy requires that agencies feel free to ask legislation which will terminate or avoid adverse contentions and litigations." *Wong Yang Sung* v. *McGrath,* 339 U. S. 33, 47, modified 339 U. S. 908 (1950). This is *a fortiori* true when all that has happened is that, at the request of the Department of State to preserve the *status quo,* a committee of one house has rejected an amendment passed by the other which exceeded the clarification the agency had sought.

We are not unmindful of the problems the Federal Maritime Commission may face in endeavors, whether under § 21 or § 27, to require foreign shipping lines to produce documents located abroad. But we are not now confronted with an effort to hold a foreign carrier in contempt or to assess fines for refusing at its government's command to produce documents in response to a subpoena, and we ought

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[14] Although Senator Kefauver had prepared amendments that would have restored the provisions of the House bill, these were never called up for action by the Senate. Legislative History, *supra* at 35-36.

not to anticipate that the problem will inevitably arise. Statements as to the adamant and monolithic refusal of foreign governments to permit their carriers to produce copies of records considerably outrun the realties reported by the Department of State to the Senate Committee on Commerce. See Hearings on Steamship Conference Dual Rate Bill, *supra* at 588-89. A court should not assume that in the long run foreign nations will be wholly unresponsive to requests for information as to the operations of their carriers essential to this country's regulatory processes, which we are quite willing, *mutatis mutandis*, to have our carriers make available to them. Indeed, when the issue is sharply posed, the very foreign carriers that have doubtless had a hand in stimulating the attitudes of their governments may prefer to produce at least some of the desired information than risk disapproval of rates for failure of proof. See Note, Rate Regulation in Ocean Shipping, 78 Harv. L. Rev. 635, 642-44 (1965). From the standpoint of national interest judicial denial of administrative power even to start the process of seeking the information would be the worst possible course; foreign governments would scarcely be impressed by diplomatic suggestions to allow their carriers to furnish information if American courts had already held our agencies powerless to secure this under domestic law. In any event, such considerations have no more force as to the construction of § 27 of the Shipping Act than we held them to have with respect to § 21. See *Kerr S.S. Co.* v. *United States*, *supra*, 284 F. 2d at 64.

Affirmed.

MOORE, *Circuit Judge* (dissenting):

I dissent.

When Congress authorized the production of evidence "from any place in the United States," it is to be presumed that it was aware of the territory embraced within the United States. If Congress had intended to enact legislation authorizing such production "from any place in the world," it is again to be presumed that it had available sufficiently skilled legislative draftsmen who could have used "world" instead of "United States"—a not altogether too difficult bit of draftsmanship. The real difficulty which seems to have faced the majority and which requires sixteen pages of history and argument as to how useful world subpoena powers would be, is to demonstrate that the "plain meaning" of "United States" is "world." Even in this day, when these terms appear to be becoming congruous, I find the supposition that Congress could not understand the difference, and hence requires judicial legislation to express its real intent, quite incongruous.

Moreover, the majority's reliance on *Kerr Steamship Co.* v. *United States,* 284 F. 2d 61 (2d Cir. 1960); see also *Montship Lines Ltd.* v. *FMC,* 295 F. 2d 147 (D. C. Cir. 1961), is misplaced since that decision dealt solely with Section 21 of the Shipping Act, and the information-gathering powers of the FMC granted therein are not circumscribed by a congressional directive stating that documents may be obtained "from any place in the United States" such as is contained in Section 27 of the Act, the effect of which is the sole issue here. Nor should any significance be attached to the fact that the same Senate committee which flatly refused in 1961 to expand the FMC's information-gathering powers under Section 27 acknowledged that two United States Courts of Appeal had permitted the FMC to obtain documents located outside the United States pursuant to lawfully issued orders under Section 21.

Finally, I consider startling the implication in the majority opinion that considerations of "national interest" and foreign policy should influence this court's view of the subpoena power of an administrative agency. Such matters are without doubt for consideration by the Executive, not the Judicial, branch of government. Cf. *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 318-22 (1936). Even the Senate, the advice and consent of which is crucial to certain foreign policy decisions made by the Executive, recognized that the expansion of the FMC's subpoena power under Section 27 in the face of the strongest possible objection from the State Department and explicit directives not to produce documents from numerous friendly maritime nations (including the United Kingdom, Italy and Japan) "would only muddy the waters and do violence to our foreign policy . . ." S. Rep. No. 860, 87th Cong. 1st Sess. (1961), reported in 1961 U. S. Code & Admin. News 3108, 3132.

APPENDIX B

Opinion of the District Court

[CAPTION OMITTED]

RYAN, J.:

Petitioners Ludlow Corporation and the Federal Maritime Commission seek, pursuant to § 29 of the Shipping Act of 1916, 46 U.S.C. § 828, to enforce obedience to certain subpoenas issued by the Commission. Each petitioner by order to show cause moved to intervene in support of the other's application. An order has been entered permitting Ludlow to intervene and the Commission has withdrawn its motion.

Ludlow, a Massachusetts corporation with its principal place of business in that state, is engaged in the manufacture and distribution of jute products. Respondents are officers or agents of shipping companies which are member carriers of the Calcutta, East Coast of India and East Pakistan/U.S.A. Congress—"the Calcutta Conference,"[1] which has common tariffs rates, practices and rules established pursuant to Agreement No. 8650 and approved by the Federal Maritime Commission on March 31, 1964, under Section 15 of the Shipping Act of 1916, thus giving its domestic and alien member carriers exemptions from domestic antitrust laws. The member carriers of the Calcutta Conference are engaged in common carrier transportation from East India and Pakistan Ports to United States Atlantic and Gulf of Mexico Ports. By virtue of a "dual-rate" contract concluded on July 11, 1964, Ludlow

[1] A steamship conference is a formal association of steamship lines making scheduled sailings over most of the world's trade routes, having for their purpose the reaching of common agreement among their members with respect to transportation rates and other conditions of carriage of goods and passengers.

has assumed the obligation to transport all of its imports with member carriers of the Conference.

Whether respondents are American or Foreign Flag members is not disclosed; both take the same position on this application.

On July 6, 1965, the Conference filed with the Commission notice of a general across-the-board rate increase to become effective on October 11, 1965. Ludlow immediately entered a protest, and thereafter on August 10, 1965, filed a complaint with the Commission under § 22 of the Act, 46 U.S.C. § 821.

Specifically, the complaint alleges that after October 11, 1965, Ludlow would be required to pay ocean transportation rates detrimental to the commerce of the United States contrary to the public interest, and unreasonably high, in violation of §§ 14b, 15, and 18(b)(5) of the Shipping Act of 1916, 46 U.S.C. §§ 813b, 814, 817(b)(5). The complaint seeks damages, an injunction against the continued use of the allegedly illegal rates, and the establishment of a lawful rate by the Commission.

Pursuant to § 27 of the Act,[2] 46 U.S.C. § 826, a Hearing Examiner of the Commission on October 18, 1965 granted Ludlow's application for the issuance of subpoenas compelling the production of documents by respondents. Later the Examiner issued a clarification of his ruling directing that his decision was not to be construed as requiring production of documents from any place not in the United States. Thereafter, on November 12, 1965, the Commission granted Ludlow's application for the issuance of additional subpoenas requiring the production of documents "wherever located."

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[2] "For the purpose of investigating alleged violations of this chapter, the Federal Maritime Board may by subpoena compel the attendance of witnesses and the production of books, papers, documents, and other evidence from any place in the United States at any designated place of hearing.* * *"

On that application respondents sought leave to appeal from the Examiner's ruling compelling production of any documents and in addition contended that the restricting of the subpoenas to documents located only in the United States placed American Flag carriers at a disadvantage with their foreign competitors. This last argument was resolved by the granting of complainant's application and leave to appeal was denied. Respondents have refused to comply as to any documents. They argue that the Commission's application to enforce the subpoenas should be denied because they were not served in accordance with administrative rules, because they were issued without statutory authorization in that no alleged violation of the Act is involved, in that they seek production of documents located outside the United States and of documents irrelevant to an alleged violation. To this petitioner's reply that the limitations sought to be imposed on the Commission's power would frustrate its investigative power and Congressional purpose.

Rule 9(c) of the Rules of Practice and Procedure of the Federal Maritime Commission, 46 C.F.R. § 502.133 provides in pertinent part:

> "In making service the original subpoena shall be exhibited to the person served, shall be read to him if he is unable to read, and a copy thereof shall be left with him."

Respondents contend that seventeen of the subpoenas here involved were served improperly because they were exhibited and delivered to employees of the respondents. We do not agree that Rule 9(c) requires nothing less than personal service upon the officers of the carriers named as defendants in this action. The Rule does not direct that the person served must be the person named in the subpoena. Moreover, respondents do not question the authority of the

employees served. We conclude that the manner of service was in full compliance with Rule 9(c) of the Commission.

By the literal terms of § 27 a subpoena may issue only pursuant to an investigation of an "alleged violation." (See Alcoa Steamship Co. v. Federal Maritime Commission, 348 F. 2d 756, 759 (D.C. Cir. 1965.)

Ludlow's complaint, filed in compliance with the Commission's rules, 46 C.F.R. § 502.62, and § 22 of the Act, 46 U.S.C. § 821, clearly alleges violations of §§ 14b, 15 and 18(b)(5). Nevertheless the respondents maintain that the requirements of § 27 have not been met because the acts charged, i.e., the unreasonably high rates, are not declared unlawful by the Act and cannot constitute a violation of it until they have been outlawed by the Commission—in short that there can be no violation of § 18(b) in advance. This position is in no way supported by the wording of the Act and in principle offends the entire scheme of regulation embodied in the statute. Moreover, it ignores the violations of §§ 14 and 15 charged.

Sections 14b, 15 and 18(b)(5) are similar in language and composition. Their interpretation should be governed by like principles.

While they do not declare such contracts or rates "unlawful" these three sections do anticipate that the Commission, after a hearing, shall have the power to disapprove any rate, contract or agreement which is found to be detrimental to the commerce of the United States. It does not follow, however, that the Commission's subpoena powers must remain unexercised because it has not yet withdrawn approval of a currently "lawful" agreement.

Section 27 speaks not in terms of "violations" but rather "alleged violations." Ludlow has alleged in substance that the respondents are engaged in activity which the Commission will condemn after due hearing. That is all that is necessary. If, indeed, the complaint did not

allege statutory violations then it would have been vulnerable to a motion to dismiss. Section 22, 46 U.S.C. § 821, provides that "[a]ny person may file with the [Commission] a sworn complaint *setting forth any violation of this chapter* by a common carrier by water, or other person subject to this chapter * * *." (Emphasis added.) In light of this express language the contention that "a person can file a complaint without alleging a violation of the Act" is singularly unpersuasive.

The Supreme Court has held that questions arising under the Shipping Act are generally within the primary jurisdiction of the Commission, which is charged with the major responsibility for enforcement. Far East Conference v. United States, 342 U.S. 570 (1952). It has written that a decision dealing with shipping regulation

> "involves questions of an exceptional character, the solution of which may call for the exercise of a high degree of expert and technical knowledge. Whether a given agreement among such carriers should be held to contravene the act may depend upon a consideration of economic relations, of facts peculiar to the business or its history, of competitive conditions in respect of the shipping of foreign countries, and of other relevant circumstances, generally unfamiliar to a judicial tribunal, but well understood by an administrative body especially trained and experienced in the intricate and technical facts and usages of the shipping trade; and with which that body consequently is better able to deal."

United States Nav. Co. v. Cunard Steamship Co., 248 U.S. 474, 485. Whatever may be the form of the agreement, and "whether it be lawful or unlawful upon its face, Congress undoubtedly intended that the [Commission] shall possess

the authority primarily to hear and adjudge the matter." *Id.* at 247.

To assure that the Commission could fully meet its responsibilities, Congress provided it with the necessary means to enforce the regulatory scheme established by the legislation. 53 Cong. Rec. 8084, 8095, 8096 (1916). A complaint proceeding under § 22 was deemed to be one way of supervising Conference activities. Sections 14b, 15 and 18(b)(5) prescribe hearings in order to ascertain whether violations have taken place; in fact § 23, 46 U.S.C. § 822, directs that an order of the Commission may be entered only after a "full hearing." The subpoena provisions of § 27 are obviously a vital complement to the investigatory proceedings prescribed by the Shipping Act. To read or interpret a provision of this nature in a manner which would totally frustrate Congressional intention would be wholly unjustified.

According to the interpretation advanced by the respondents, apparently no subpoena could issue to investigate a 14b complaint unless it was alleged that a contract was being utilized after permission had been withdrawn or before permission had been granted; apparently no subpoena could issue under § 15 unless it was alleged that an approved or disapproved agreement had been put into operation. The respondents would have us limit the exercise of the subpoena power to cases involving prima facie violations where the need for a subpoena would be at a minimum.

There is nothing in F.M.C. v. Caragher, 243 F. Supp. 136 (S.D.N.Y. 1965) to the contrary. The court was there faced with a preliminary investigation initiated by the Commission under § 18(b)(5) to determine whether certain rates were so unreasonably low as to be detrimental to the commerce of the United States, and the holding was that the Commission had no subpoena power except where a complaint had been filed (but *Cf.* Far East Conference v.

Federal Maritime Comm'n., 337 F.2d 146 (D.C. Cir. 1964), *cert. den.*, sub nom Pacific Coast European Conference v. Federal Maritime Comm'n, 379 U.S. 991 (1965); Pacific Westbound Conference v. United States, 332 F.2d 49 (9 Cir. 1964)).

Respondents object to that portion of the Commission's order granting additional subpoenas covering documents located outside of the United States on the ground that it would offend both the literal wording and the express intention of Congress with regard to the reach of the subpoena power under § 27. This argument was raised before the Hearing Examiner and overruled by him after a hearing.

First, respondents rely upon the phrase "from any place in the United States" as support for the proposition that the Commission cannot subpoena documents "located" in a foreign country. Petitioners reply that the statute authorizes the production of documentary evidence located outside the country, provided only that the service of the subpoena is made within the territorial limits of the United States, and in support of this interpretation they rely on three cases.

Two of these cases, Kerr Steamship Co. v. United States, 234 F. 2d 61 (2 Cir. 1960), appeal dismissed, 369 U.S. 422 (1962) (L. Hand, J.) and Montship Lines, Ltd. v. Federal Maritime Board, 295 F. 2d 147 (D.C.C.A. 1961), while not squarely directed to the question of the Commission's power to subpoena documents located abroad under Section 27, are authority for upholding such power. The decisions there revolved around the authority of the Commission to require both domestic and foreign carriers, under Section 21, to file copies of contracts wherever located or incur severe daily penalties. Both courts sustained the order of the Commission requiring the production of copies of documents located outside the country, but did not pass

on the question of the procedure to be employed to compel such production for the reason that it was not before them. Judge Hand in *Kerr* did, however, refer to Section 27 as one of the sections providing other procedure for such production, but not to the conclusion of an order under § 27. Under § 27 a subpoena commands the same attention as an order of the Commission under § 21 and other sections, and Judge Hand did hold that the Commission could by a § 21 order demand production of originals outside the United States. The court pointed out that in investigating practices of carriers engaged in commerce with the United States it was essential to know what took place outside the United States as well as within; that if the Board's power to examine witnesses as to transactions had abroad could not be questioned neither could its power to compel the production of a copy of the document reflecting such transaction, and that if such inquiry by the Board annoyed foreign governments that was for the State Department and not for the courts. If these reasons support the power of the Commission to compel production of documents under its general regulatory and investigatory program, how much more do they support its power when it is acting in a quasi judicial capacity on the complaint of one claiming injury because of the acts of persons within its jurisdiction.

The same Commission order was upheld by Judge Bazelem in *Montship* in the District of Columbia Court of Appeals as against all foreign flag respondents and, rejecting their argument that § 21 should be restricted as they contended § 27 to documents located in the United States, he said that it was questionable whether the Board was powerless under the latter section to subpoena documents outside the United States, and cited S.E.C. v. Minas De Artemisa, S.A., 150 F. 2d 215 (9 Cir. 1945).

To distinguish between the holdings in *Kerr* and *Montship* and this case on the presence of the words "from any place in the United States" is to say that where the Board

is gathering information for the purpose of regulating or enforcing generally with no charge of a violation of the Act it has more power than when it is adjudicating a specific alleged violation. Such a "bifurcation of the Board's authority" (*Montship*, p. 153) is not supported in logic or in the purpose of the Act.

In the *De Artemisa* case a similarly worded statute, § 19(b) of the Act, 15 U.S.C. § 77s(b) "* * * the production of such documentary evidence may be required from any place in the United States" was held not to limit the power of the Commission in conducting an investigation of a foreign corporation doing business in the United States to subpoena relevant documents only in the United States. The words "from any place in the United States" were construed by the court as expanding the reach of the Commission's subpoena power beyond the territorial limits imposed by Rule 45(e)—rather than restricting its inquisitorial power because of the fortuitous placement of the documents sought.

The presence of these words in § 27 and their absence from § 21 has no significance other than that one deals with subpoenas which are limited by Federal Rules of Practice, while the other is not. For the same reason the legislative history referred to by respondents has nothing to do with the question before us. As the court pointed out in *Artemisa*, the sole territorial limitation on the subpoena was that it be served within the United States. The reasoning of Judge Nealy that to immunize a foreign corporation doing business in the United States merely because it maintained its documents in its principal place of business outside of the United States would be discriminatory and violative of Congressional purpose to regulate all corporations subject to the Commission's jurisdiction, applies with equal force to our situation. Indeed discriminatory treatment was the very basis of the objection initially raised by respondents before the Commission when they argued that

to limit the subpoena to places within the United States would place domestic flag carriers at a disadvantage with their foreign flag competitors. Their objection was well taken since a domestic carrier with its principal place of business in the United States could hardly argue for immunity from producing such documents as it might maintain in a foreign office. Obviously considerations of undue interference with foreign governments and companies, the reasons usually advanced against production of documents located abroad, would not apply to domestic carriers. The result would be that while these carriers would be required to produce all their documents their foreign competitors would be excused from doing so. Such arbitrary treatment is not consonant with the purposes of the Shipping Act which is for the benefit of all carriers—whether domestic or foreign—and which must apply with equal force to them impartially. Recognizing this the respondents have broadened their attack and would have this court insulate all carriers subject to the Act whether of foreign or domestic flag—so long as their documents happened to be found outside the United States. There then would be nothing to prevent them from removing or maintaining all their documents abroad, and considering the nature of the business they are engaged in it is not unlikely that that is just where their documents might be found. That the administration of the Shipping Act cannot turn upon the incidental or accidental, or even intentional location of documents, is obvious.

In any event whether foreign flag or domestic, respondents are all within the jurisdiction of the Commission; they maintain an office for the transaction of business in the United States; they have affirmatively sought and obtained examinations of the complainant Ludlow in the proceedings pending before the Commission and have answered the complaint. We conclude that to compel them to produce e idence, wherever located, relevant and necessary to a

determination of the charges made against them of violation of a statute under which they enjoy certain immunities is clearly within the power of the Commission.

As a last resort, the respondents contend that the data requested is irrelevant to a complaint proceeding under § 18(b)(5). They argue that some of the items listed in the subpoenas bear only on the question of the rate of return earned by each carrier in the Conference, and as the Commission does not have the general power under § 18(b)(5) to determine the reasonableness of Conference freight rates the material requested must therefore be deemed irrelevant.

Respondents did not raise this objection either at the initial hearing before the Examiner or at the proceedings before the Commission. The first claim of irrelevancy appeared in a letter dated December 2, 1965 addressed to the Examiner informing him that the respondents would not comply with the subpoenas. Under familiar principles of exhaustion of administrative remedies in the absence of extraordinary circumstances a reviewing court should refrain from passing upon a question not urged before the Commission. See, e.g., Unemployment Compensation Comm'n v. Aragon, 329 U.S. 143, 155 (1946). The rule is designed to give the agency charged with the primary responsibility for enforcement the initial opportunity to pass upon the question. See Hennessey v. Securities & Exchange Comm'n, 285 F.2d 511, 515 (3 Cir. 1961). Respondents neglected to raise the matter in a timely fashion at the administrative level, and hence may not press the contention here.

But, even if the question had been reasonably raised before the Commission, it is improbable that the information sought would be irrelevant to a determination of whether the rates here involved would be "so unreasonably high or law as to be detrimental to the commerce of

the United States." Far East Conference v. Federal Maritime Commission, 337 F.2d 146, 150-51 (D.C. Cir. 1964), cert. den., sub nom Pacific Coast European Conference v. Federal Maritime Comm'n, 379 U.S. 991 (1965). A subpoena generally meets the requirements for enforcement if the information sought is only reasonably relevant to the ultimate inquiry.

Respondents' final objection that the court should not order compliance with the subpoenas as to documents not in existence is premature or has been mooted by the Examiner's ruling at the hearing of December 7, 1965 that no such production was sought or would be ordered. This is clearly an afterthought which was not raised by respondents in answer to the petition, and it is overruled.

Settle order on notice to be promptly given directing compliance by respondents with subpoenas.

SYLVESTER J. RYAN,

U. S. D. J.

Dated: New York, N. Y.
January 25, 1966

APPENDIX C

Section 14b of the Shipping Act

"Notwithstanding any other provisions of this Act, on application the Federal Maritime Commission (hereinafter 'Commission'), shall, after notice, and hearing, by order, permit the use by any common carrier or conference of such carriers in foreign commerce of any contract, amendment, or modification thereof, which is available to all shippers and consignees on equal terms and conditions, which provides lower rates to a shipper or consignee who agrees to give all or any fixed portion of his patronage to such carrier or conference of carriers unless the Commission finds that the contract, amendment, or modification thereof will be detrimental to the commerce of the United States or contrary to the public interest, or unjustly discriminatory or unfair as between shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, and provided the contract, amendment, or modification thereof, expressly (1) permits prompt release of the contract shipper from the contract with respect to any shipment or shipments for which the contracting carrier or conference of carriers cannot provide as much space as the contract shipper shall require on reasonable notice; (2) provides that whenever a tariff rate for the carriage of goods under the contract becomes effective, insofar as it is under the control of the carrier or conference of carriers, it shall not be increased before a reasonable period, but in no case less than ninety days; (3) covers only those goods of the contract shipper as to the shipment of which he has the legal right at the time of shipment to select the carrier: *Provided, however,* That it shall be deemed a breach of the contract if, before the time of shipment and with the intent to avoid his obligation under the contract, the contract shipper divests himself, or with the same intent permits himself to be divested,

of the legal right to select the carrier and the shipment is carried by a carrier which is not a party to the contract; (4) does not require the contract shipper to divert shipment of goods from natural routings not served by the carrier or conference of carriers where direct carriage is available; (5) limits damages recoverable for breach by either party to actual damages to be determined after breach in accordance with the principles of contract law: *Provided, however,* That the contract may specify that in the case of a breach by a contract shipper the damages may be an amount not exceeding the freight charges computed at the contract rate on the particular shipment, less the cost of handling; (6) permits the contract shipper to terminate at any time without penalty upon ninety days' notice: (7) provides for a spread between ordinary rates and rates charged contract shippers which the Commission finds to be reasonable in all the circumstances but which spread shall in no event be more than 15 per centum of the ordinary rates; (8) excludes cargo of the contract shippers which is loaded and carried in bulk without mark or count except liquid bulk cargoes, other than chemicals, in less than full shipload lots: *Provided, however,* That upon finding that economic factors so warrant, the Commission may exclude from the contract any commodity subject to the amendments, and modifications shall be lawful only when and as long as permitted by the Commission; before permission is granted or after permission is withdrawn it shall be unlawful to carry out in whole or in part, directly or indirectly, any such contract, amendment, or modification. As used in this section, the term 'contract shipper' means a person other than a carrier or conference of carriers who is a party to a contract the use of which may be permitted under this section."

Section 15 of the Shipping Act

"That every common carrier by water, or other person subject to this Act, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The tem 'ageement' in this section includes understandings, conferences, and other arrangements.

"The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations. No such agreement shall be approved, nor shall continued approval be permitted for any agreement (1) between carriers not members of the same conference or conferences of carriers serving different trades that would otherwise be naturally competitive, unless in the case of agreements between carriers, each carrier, or in the case of agreements between conferences, each conference

retains the right of independent action, or (2) in respect to any conference agreement, which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade, or fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal.

"The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it, or of failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

"Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation; except that tariff rates, fares, and charges, and classifications, rules, and regulations explancharges covered by section 14b of this Act which do not involve a change in the spread between such rates and atory thereof (including changes in special rates and charges and the rates and charges applicable to noncontract shippers) agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with the publication and filing requirements of section 18(b) hereof and with the provisions of any regulations the Commission may adopt.

"Every agreement, modification, or cancellation lawful under this section, or permitted under section 14b, shall be excepted from the provisions of the Act approved July 2, 1890, entitled 'An Act to protect t ade and commerce against unlawful restraints and monopol es', and amendments and Acts supplementary thereto, and the provisions of sections

73 to 77, both inclusive, of the Act approved August 27, 1894, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes', and amendments and Acts supplementary thereto.

"Whoever violates any provision of this section or of section 14b shall be liable to a penalty of not more than $1,000 for each day such violation continues, to be recovered by the United States in a civil action."

Section 18 of the Shipping Act

"(a) Every common carrier by water in interstate commerce shall establish, observe, and enforce just and reasonable rates, fares, charges, classifications, and tariffs, and just and reasonable regulations and practices relating thereto and to the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the carrying of personal, sample, and excess baggage, the facilities for transportation, and all other matters relating to or connected with the receiving, handling, transporting, storing, or delivering of property.

"Every such carrier shall file with the Commission and keep open to public inspection, in the form and manner and within the time prescribed by the Commission, the maximum rates, fares, and charges for or in connection with transportation between points on its own route; and if a through route has been established, the maximum rates, fares, and charges for or in connection with transportation between points on its own route and points on the route of any other carrier by water.

"No such carrier shall demand, charge, or collect a greater compensation for such transportation than the rates, fares, and charges filed in compliance with this sec-

tion, except with the approval of the Commission and after ten days' public notice in the form and manner prescribed by the Commission, stating the increase proposed to be made; but the Commission for good cause shown may waive such notice.

"Whenever the Commission finds that any rate, fare, charge, classification, tariff, regulation, or practice, demanded, charged, collected, or observed by such carrier is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable maximum rate, fare, or charge, or a just and reasonable classification, tariff, regulation, or practice.

"(b)(1) From and after ninety days following October 3, 1961 every common carrier by water in foreign commerce and every conference of such carriers shall file with the Commission and keep open to public inspection tariffs showing all the rates and charges of such carrier or conference of carriers for transportation to and fom United States ports and foreign ports between all points on its own route and on any through route which has been established. Such tariffs shall plainly show the places between which freight will be carried, and shall contain the classification of freight in force, and shall also state separately such terminal or other charge, privilege, or facility under the control of the carrier or conference of carriers which is granted or allowed, and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates, or charges, and shall include specimens of any bill of lading, contract of affreightment, or other document evidencing the transportation agreement. Copies of such tariffs shall be made available to any person and a reasonable charge may be made therefor. The requirements of this section shall not be applicable to cargo loaded and carried in bulk without mark or count, or to cargo which is lumber. As used in this paragraph, the

term 'lumber' means lumber not further manufactured than passing lengthwise through a standard planing machine and crosscut to length, logs, poles, piling, and ties, including such articles preservatively treated, or bored, or framed, but not including plywood or finished articles knocked down or set up.

"(2) No change shall be made in rates, charges, classifications, rules or regulations, which results in an increase in cost to the shipper, nor shall any view or initial rate of any common carrier by water in foreign commerce or conference of such carriers be instituted, except by the publication, and filing, as aforesaid, of a new tariff or tariffs which shall become effective not earlier than thirty days after the date of publication and filing thereof with the Commission, and each such tariff or tariffs shall plainly show the changes proposed to be made in the tariff or tariffs then in force and the time when the rates, charges, classifications, rules or regulations as changed are to be become effective: Provided, however, that the Commission may, in its discretion and for good cause, allow such changes and such new or initial rates to become effective upon less than the period of thirty days herein specified. Any change in the rates, charges, or classifications, rules or regulations which results in a decreased cost to the shipper may become effective upon the publication and filing with the Commission. The term 'tariff' as used in this paragraph shall include any amendment, supplement or reissue.

"(3) No common carrier by water in foreign commerce or conference or such carriers shall charge or demand or collect or receive a greater or less or different compensation for the transportation of property or for any service in connection therewith than the rates and charges which are specified in this tariffs on file with the Commission and duly published and in effect at the time; nor shall any such carrier rebate, refund, or remit in any manner

or by any device any portion of the rates or charges so specified, nor extend or deny to any person any privilege or facility, except in accordance with such tariffs.

"(4) The Commission shall by regulations prescribe the form and manner in which the tariffs required by this section shall be published and filed; and the Commission is authorized to reject any tariff filed with it which is not in conformity with this section and with such regulations. Upon rejection by the Commission, a tariff shall be void and its use unlawful.

"(5) The Commission shall disapprove any rate or charge filed by a common carrier by water in the foreign commerce of the United States or conference of carriers which, after hearing, it finds to be so unreasonably high or low as to be detrimental to the commerce of the United States.

"(6) Whoever violates any provision of this section shall be liable to a penalty of not more than $1,000 for each day such violation continued, to be recovered by the United States in a civil action."

Section 21 of the Shipping Act

"The Federal Maritime Board and the Secretary of Commerce may require any common carrier by water, or other person subject to this chapter, or any officer, receiver, trustee, lessee, agent, or employee thereof, to file with it or him any periodical or special report, or any account, record, rate, or charge, or any memorandum of any facts and transactions appertaining to the business of such carrier or other person subject to this chapter. Such report,

account, record, rate, charge, or memorandum shall be under oath whenever the Board or Secretary so requires, and shall be furnished in the form and within the time prescribed by the Board or Secretary. Whoever fails to file any report, accounts, record, rate, charge, or memorandum as required by this section shall forfeit to the United States the sum of $100 for each day of such default.

"Whoever willfully falsifies, destroys, mutilates, or alters any such report, account, record, rate, charge, or memorandum or willfully files a false report, account, record, rate, charge, or memorandum shall be guilty of a misdemeanor, and subject upon conviction to a fine of not more than $1,000, or imprisonment for not more than one year, or to both such fine and imprisonment."

Section 22 of the Shipping Act

"Any person may file with the Federal Maritime Board a sworn complaint setting forth any violation of this chapter by a common carrier by water, or other person subject to this chapter, and asking reparation for the injury, if any, caused thereby. The Board shall furnish a copy of the complaint to such carrier or other person, who shall, within a reasonable time specified by the Board, satisfy the complaint or answer it in writing. If the complaint is not satisfied the Board shall, except as otherwise provided in this chapter, investigate it in such manner and by such means, and make such order as it deems proper. The Board, if the complaint is filed within two years after the cause of action accrued, may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation.

"The Board, upon its own motion, may in like manner and, except as to orders for the payment of money, with the same powers, investigate any violation of this chapter."

Section 27 of the Shipping Act

"For the purpose of investigating alleged violations of this chapter, the Federal Maritime Board may by subpoena compel the attendance of witnesses and the production of books, papers, documents, and other evidence from any place in the United States at any designated place of hearing. Subpoenas may be signed by any member of the Board, and oaths or affirmations may be administered, witnesses examined, and evidence received by any member or examiner, or, under the direction of the Board, by any person authorized under the laws of the United States or of any State, Territory, District, or possession thereof to administer oaths. Persons so acting under the direction of the Board and witnesses shall, unless employees of the Board, be entitled to the same fees and mileage as in the courts of the United States. Obedience to any such subpoena shall, on applications by the Board, be enforced as are orders of the Board other than for the payment of money."

Petitions (46 C.F.R. § 502.69)

All claims for relief or other affirmative action by the Commission, except as otherwise provided herein, shall be by written petition, which shall state clearly and concisely the petitioner's grounds or interest in the subject matter, the facts relied upon and the relief sought, shall cite by appropriate reference the statutory provisions or other authority relied upon for relief, shall be served upon all parties named therein, and shall conform otherwise to the requirements of Rule 8. Replies thereto shall conform to the requirements of Rule 5 (*n*).

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 224—September Term, 1965.

(Argued February 21, 1966 Decided August 3, 1966.)

Docket No. 30041

FEDERAL MARITIME COMMISSION,

Petitioner-Appellant and Cross-Appellee,

v.

E. G. CARAGHER, Vice President, Norton Lilly & Co., Inc., General Agents for Yamashita-Shinnihon Steamship Co., Ltd. (formerly Yamashita Kisen Kaisha), Sochira Yaguchi, General Manager, Nippon Yusen Kaisha, Ltd., Ib Alvin, Moller-Maersk Line, A. P., P. D. Marchessini, P. D. Marchessini & Co., Cortland Linder, Managing Director, Kerr Steamship Co., Inc., General Agents for Kawasaki Kisen Kaisha, Ltd., T. J. Royden, President, Funche, Edye & Co., Inc., General Agents for De La Rama Lines, James Young, Vice President, Barber Fern-Ville Lines, Barber Wilhelmsen Line,

Respondents-Appellees and Cross-Appellants,

and

MORDECAI CHOVERS, Vice President, American-Israeli Shipping Co., Inc., General Agents for Zim Israel Navigation Co., Ltd.,

Respondent-Appellee.

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Before:

WATERMAN, MOORE and FRIENDLY,
Circuit Judges.

Cross appeals from a final judgment below, United States District Court for the Southern District of New York, McGohey, *J.*, opinion reported 243 F. Supp. 136 1965), upon an order to show cause filed by Federal Maritime Commission. Respondents-cross-appellants had been served with Commission subpoenas to produce records and documents in an investigation proceeding; they did not comply with the subpoenas, and the Commission sought enforcement thereof in the district court. From the order not enforcing items (3), (4), and (5) of each of the subpoenas the Commission appealed, and from the portion of the same order enforcing items (1) and (2) in the subpoenas respondents appealed. *Held*: the subpoenas are fully enforceable and cause remanded for such a district court order to issue.

DAVID L. ROSE, Attorney, Department of Justice; J. William Doolittle, Acting Asst. Attorney General; Robert M. Morgenthau, U. S. Attorney, Southern District of New York; Jack H. Weiner, Attorney, Department of Justice; H. B. Mutter, Acting Solicitor, Federal Maritime Commission, *for Petitioner-Appellant and Cross-Appellee.*

THOMAS K. ROCHE, HAIGHT, GARDNER, POOR & HAVENS, SANFORD C. MILLER, WILLIAM F. FAISON, New York City, *for Respondents-Appellees and Cross-Appellants.*

DAVID I. GILCHRIST, HILL, BETTS, YAMAOKA, FREEHILL & LONGCOPE, EDWIN LONGCOPE, New York City, *for Respondent-Appellee.*

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WATERMAN, *Circuit Judge*:

This action was commenced in the United States District Court for the Southern District of New York by the Federal Maritime Commission (hereafter the Commission) to enforce subpoenas *duces tecum* issued to the Respondents-Appellees and Cross-Appellants (hereafter Respondents) pursuant to Section 27 of the Shipping Act of 1916.[1] Each of the respondents is either the principal officer or custodian of records for each of the respondent common carrier steamship lines, which in turn are all members of the New York Freight Bureau (Hong Kong) engaged in the transportation of commodities by water between Hong Kong and the Atlantic and Gulf ports of the United States.[2]

I.

The subpoenas *duces tecum* were issued in connection with an "Investigation of Rates in the Hong Kong-United States Atlantic and Gulf Trade," begun by the Commission on December 10, 1962, pursuant to Section 22 of the Ship-

[1] 46 U. S. C. § 826. Section 27 provides in pertinent part that "For the purpose of investigating alleged violations of this chapter, the Federal Maritime Board may by subpoena compel the attendance of witnesses and the production of books, papers, documents, and other evidence from any place in the United States at any designated place of hearing." The regulatory agency established by the Shipping Act of 1916 was called the Shipping Board and many of the 1916 provisions refer to the "Board." In 1933 the Board became the Shipping Board Bureau, which was followed in 1936 by the United States Maritime Commission, which was succeeded in 1950 by the Federal Maritime Board, which in turn gave way in 1961 to the Federal Maritime Commission. In this opinion the Shipping Board and its successors are collectively termed the "Commission."

[2] The number of respondents was reduced to 39 at the time of the beginning of the hearings held on April 1, 1964.

ping Act of 1916,[3] after Sabre Line had filed an informal protest against the present level of rates charged by the New York Freight Bureau (Hong Kong). The original purpose of the investigation was to determine whether any rate in this trade[4] was "so unreasonably low as to be detrimental to the commerce of the United States" and thus should be disapproved by the Commission pursuant to Section 18(b)(5) of the Shipping Act of 1916.[5] Thereafter, at the instance of one of the respondents, the Isbrandtsen Steamship Company-Division of American Export Lines, the investigation was expanded by a Commission order dated June 20, 1963, so as also to determine "whether any of the respondents are, or have been, engaging in practices which may be in violation of Sections 14, 16, or 17 of the Shipping Act of 1916,[6] or which may result in the charging of lower rates than the rates on file with the Commission, in violation of Section 18(b)(3) of the Act."[7]

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[3] 46 U. S. C. § 821. Section 22 provides in pertinent part that "Any person may file with the Federal Maritime Board a sworn complaint setting forth any violation of this chapter by a common carrier by water . . .

"The Board, upon its own motion, may in like manner and, except as to orders for the payment of money, with the same powers, investigate any violation of this chapter."

[4] A "trade" is a group of routes linking one geographical area to another. See Note, *Rate Regulation in Ocean Shipping*, 78 Harv. L. Rev. 635 (1965).

[5] 46 U. S. C. § 817(b)(5). Section 18(b)(5) states that "The Commission shall disapprove any rate or charge filed by a common carrier by water in the foreign commerce of the United States or conference of carriers which, after hearing, it finds to be so unreasonably high or low as to be detrimental to the commerce of the United States."

[6] 46 U. S. C. §§ 812, 815, 816.

[7] 46 U. S. C. § 817(b)(3).

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The scope of the investigation having been finally defined, Hearing Counsel,[8] on September 3, 1963, pursuant to authority purportedly granted the Commission by Section 27 of the Shipping Act of 1916,[9] filed an application to serve upon each respondent a subpoena *duces tecum* calling for the production of: "(1) All inbound rated manifests for cargo transported from Hong Kong to the Atlantic or Gulf coasts from January 1, 1962 to the present; (2) All inbound rated manifests in possession of the addressees at the time of the hearing for cargo loaded in Hong Kong but which vessels have not yet arrived at Atlantic or Gulf ports; (3) All stevedoring and terminal services contracts which contained rates and conditions for handling cargo moving from Hong Kong to New York City, New York, during the year 1962; (4) All invoices evidencing billing for stevedoring and terminal services in connection with handling cargo moving from Hong Kong to New York City, New York, during the year 1962; and (5) All cancelled checks or receipts for payment for stevedoring and terminal services in connection with handling cargo moving from Hong Kong to New York City, New York, during the year 1962." [10]

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[8] Hearing Counsel represents the public interest in proceedings before the Commission.

[9] See note 1 *supra*.

[10] The Presiding Examiner granted the application for the subpoenas to the extent the documents sought were located within the United States and neither the Hearing Counsel nor the Commission has attempted to expand the geographical scope of the subpoenas. Thus the geographic reach of the Commission's subpoena is not involved here. Twenty of the respondents, objecting to the Examiner's ruling, carried their objections through the steps of administrative reconsideration and review, and, eventually, to the Commission itself, where, at long last, respondents' final motion for review was denied.

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A hearing in furtherance of the underlying investigation was held on April 21, 1964. Some of the named respondents produced all the documents mentioned in the subpoenas or availed themselves of an alternate procedure suggested by the Hearing Counsel and agreed to permit inspection of the documents by employees of the Commission at a time and place mutually agreeable to Hearing Counsel and to them. Respondent Mordecai Chovers, representative of Zim Israel Navigation Co., Ltd., produced the documents referred to in items (1) and (2) of the subpoena but refused to produce the documents referred to in items (3), (4), and (5). The respondents-appellees and cross-appellants in this case refused to produce any of the documents to which the subpoenas referred. On June 2, 1964 the Hearing Examiner referred the refusals to the Commission for action. The hearing was concluded on July 2, 1964 without definite action having been taken on the refusals.[11] Thereafter, briefs were filed by all the parties in connection with the underlying investigation and the matter was submitted to the Hearing Examiner for decision on February 5, 1965. No decision has yet been handed down by the Hearing Examiner who is awaiting the outcome of the present enforcement proceedings.[12]

On May 19, 1965, almost one year after the investigation was concluded and more than three months after the matter

[11] The Commission claims it referred the enforcement of the subpoenas to the Attorney General on July 9, 1964.

[12] Rule 16(c) of the Federal Maritime Commission's Rules of Practice and Procedure provides that: "At any time prior to the filing of his initial or recommended decision, the presiding officer, either upon petition or upon his own initiative may, for good cause shown and upon reasonable notice, reopen the case for the receipt of further evidence." The Hearing Examiner wisely realized that if the subpoenas were to be enforced in their entirety the case should be reopened because much more relevant material would be available.

was submitted to the Hearing Examiner for decision, the Commission, pursuant to Section 29 of the Shipping Act of 1916,[13] applied to the court below for an order to show cause why respondents should not be compelled to comply fully with the subpoenas issued by the Examiner. Respondents opposed enforcement on the following three grounds: the requested documents were not relevant; the hearing had already been concluded and the record closed; Section 27's grant of subpoena power to the Commission expressly provided that the power could only be used "for the purpose of investigating alleged violations" of the Act and thus was inapplicable to a Section 18(b)(5) rate investigation proceeding because that Section did not in terms provide for investigations of "violations" but merely stated the Commission had the power to disapprove rates "which, after hearing, it finds to be so unreasonably high or low as to be detrimental to the commerce of the United States." The district court directed compliance with items (1) and (2) of the subpoenas on the ground the documents requested (cargo manifests) appeared relevant to the investigation of possible violations of Sections 14, 16, 17 and 18(b)(3).[14] It sustained respondents' view of the limits of the Commission's subpoena power and denied enforcement as to items (3), (4), and (5), holding that the documents requested (stevedoring records) were relevant only to the Section 18(b)(5) claim that the rates charged by the New York Freight Bureau (Hong Kong) were unreasonably low, and that the Commission lacked the power to issue subpoenas in Section 18(b)(5) investigations. *Federal Maritime Commission* v. *Caragher*, 243 F. Supp. 136 (SDNY 1965).

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[13] 46 U. S. C. § 828.

[14] Portions of all these statute provisions describe certain objectionable anticompetitive practices as "violations" of the Act.

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The Commission has appealed from the district court's order denying enforcement of the subpoenas *duces tecum* as to items (3), (4), and (5). All respondents other than Mordecai Chovers appeal the grant of enforcement as to items (1) and (2). We affirm the district court as to items (1) and (2) and reverse it as to items (3), (4), and (5). We remand with directions to enforce the subpoenas in their entirety.

II.

Our decision that the Commission has the power to subpoena in a Section 18(b)(5) investigation requires a preliminary review of the manner in which the Shipping Act of 1916 attempted to regulate common carriers by water in foreign commerce, defined by the Act as transportation between the United States and foreign countries.[15] As originally enacted, the Act contained at least three distinct types of regulatory provisions. Some provisions, in terms, proscribed certain objectionable anticompetitive practices: for example, Section 14 forbade regulated carriers to employ deferred rebates, or "fighting ships," or to retaliate against shippers;[16] Section 16, in terms, prohibited rebates on established tariffs and outlawed undue preference or prejudice to any person, locality, or type of traffic.[17] A second group of provisions combatted anticompetitive practices indirectly by granting the Commission power to determine on a case-by-case basis in light of broad normative criteria whether certain practices should be disapproved: for example, Section 15 required anticompetitive agreements to be filed with the Commission and granted the Commission power to disapprove unfair or unjustly discriminatory

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[15] 46 U. S. C. § 801.

[16] 46 U. S. C. § 812.

[17] 46 U. S. C. § 815.

agreements and those detrimental to United States commerce or contrary to the public interest.[18] See Note, *Rate Regulation in Ocean Shipping*, 78 Harv. L. Rev. 635, 639 (1965). Yet a third group of provisions in the 1916 Act granted the Commission power to investigate matters not subject to its regulatory jurisdiction, which investigations would not lead to adjudicative orders but would result in reports to Congress or to the President for such action as might be deemed advisable. Shipping Act of 1916 § 12, 46 U. S. C. § 811 (investigations as to costs of domestic and foreign merchant vessels); [19] § 26, 46 U. S. C. § 825 (investigations as to acts of foreign governments).

In addition to the authority granted by the 1916 Act to the Commission to conduct the investigations provided for

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[18] 46 U. S. C. § 814. Under the terms of Section 15 an approved conference receives limited legislative permission to engage in certain forms of activity that would otherwise be unlawful under the antitrust laws. *Carnation Co.* v. *Pacific Westbound Conference*, — U. S. —, 86 S. Ct. 781 (1966). Commission approval of the enabling agreement does not insulate the particular acts taken pursuant to that agreement, such as the charging of specific rates, from the substantive standards set forth in the Shipping Act, including Section 15's standards that authorize the Commission after notice and hearing to "disapprove, cancel or modify any agreement . . . that it finds to be unjustly discriminatory or unfair . . . or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest . . ." Section 15 directs the Commission to disapprove conference agreements that violate these broad statutory criteria "whether or not previously approved by it" and thus necessarily imposes a continuing duty upon the Commission to insure that the parties to Section 15 agreements at all times comply with the Act.

To be sure, the Maritime Commission rarely, if even, utilized Section 15 to regulate conference conduct under an approved agreement. Nevertheless, we think it reasonably clear that the Commission *could* have regulated conference conduct under an approved agreement, pursuant to Section 15 of the 1916 Act.

[19] Section 12 investigations are presently handled by the Maritime Administration which under 46 U. S. C. § 1124(a) has broad subpoena powers.

in Sections 12 and 26, the Commission is authorized under Section 22 also to investigate "any violation" of the Act upon complaint or upon its own motion. Investigations such as the one at bar, which culminate in adjudicatory action by the Commission rather than in reports to Congress or the President are conducted under the authority granted by Section 22 to "investigate any violation" of the Act.[20]

Section 27 of the 1916 Act gave the Commission power to issue subpoenas "for the purpose of investigating alleged violations" of the Act. Respondents' contention, sustained below, is that the grant of this power in Section 27 only permits the Commission to issue subpoenas in Section 22 investigations commenced to determine whether there has been a violation of a provision like Section 14 that proscribes certain anticompetitive practices; and that this grant of subpoena power does not permit the Commission to issue subpoenas in Section 22 investigations commenced in furtherance of the Commission's responsibility under a provision like Section 15, or like Section 18(b)(5), that requires the Commission to decide in light of broad normative criteria whether certain practices should be disapproved. Respondents apparently argue that a practice that the Act does not, in terms, denominate unlawful but instead subjects to Commission scrutiny cannot be said to "violate" the Act until the Commission has held a hearing and disapproved it. Respondents thus urge that we conclude that an investigation commenced in order to decide whether a certain practice should be disapproved is not an investigation "for the purpose of investigating alleged violations" of the Act and that the subpoena power is therefore not available to the Commission in conducting such an investigation.

We reject respondents' contention as inconsistent with both the ostensible purpose of the regulatory pattern es-

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[20] See note 3 *supra*.

tablished by the Shipping Act of 1916 and the legislative history of Section 27.

First, it must be recognized that the adoption of respondents' contention would result in a regulatory statute that is unworkable in several significant respects. If a Commission investigation commenced in order to discharge its duty under provisions like Section 15 or Section 18(b)(5), which require it to decide in light of broad criteria whether certain practices should be disapproved, is not "for the purpose of investigating alleged violations" of the Act within Section 27, it presumably is also not an investigation of "any violation" of the Act and hence is not an investigation authorized by Section 22. The result would be a regulatory statute that, for example, expressly required the Commission to hold hearings and disapprove unfair or unjustly discriminatory agreements and those detrimental to United States commerce or contrary to the public interest [21] and yet anomalously failed to provide the Commission, charged with this statutory responsibility, with authority to compel the attendance of witnesses or production of documents at the hearings, or indeed with authority to conduct an investigation, in order to discharge this statutory responsibility. We would be reluctant to conclude that Congress intended such an unworkable and nonsensical result and we would so conclude only if this result could not be avoided by any fair interpretation of the 1916 Act. *United States* v. *American Trucking Ass'n*, 310 U. S. 534, 543 (1940); *Ozawa* v. *United States*, 260 U. S. 178, 194 (1922). Not surprisingly, one readily perceives a sensible and workable interpretation of the Section's purpose in relation to the overall purposes of the 1916 Act. We hold that when Congress provided in Section 27 that the Commission might exercise the power of subpoena "for the purpose of investigating alleged violations" of the Act it intended to authorize the

[21] See note 18 *supra*.

Commission's use of the subpoena power in investigations of alleged violations, commenced pursuant to Section 22. The latter Section's authorization to investigate "any violation" of the Act is, in turn, most sensibly interpreted as authorizing the Commission to investigate in order to determine both whether provisions that proscribe certain anticompetitive practises have been violated and whether certain practices, which the Commission has authority to disapprove, should be disapproved. If Section 22 were not interpreted to include investigations of both varieties, as we have noted, the Act would contain no authorization for investigations to enforce the second of its three distinct types of regulatory provisions.[22] From this interpretation of Section 22 and our conclusion that the phrase "for the purpose of investigating alleged violations" in Section 27 refers to investigations under Section 22 of "any violation" it follows that Section 27 not only authorizes the Commission to issue subpoenas in investigations commenced pursuant to those regulatory provisions of the Act that in terms proscribe anticompetitive practices but also in investigations commenced pursuant to those regulatory provisions that authorize the Commission to disapprove certain practices in light of broad normative criteria. To be sure, as we have pointed out, the Shipping Act of 1916 also authorized the Commission to investigate certain matters, like relative shipping costs here and abroad, and the acts of foreign governments, which matters are not subject to the Commission's regulatory jurisdiction. These are not investigations of "any violation" of the Act within Section 22[23] and thus they are not investigations "for the purpose of investigating alleged violations" within Section 27; so it

[22] See text accompanying notes 15-18 *supra*.

[23] The investigations referred to in text are instead authorized by Sections 12 and 26.

follows that the Commission is not authorized to exercise its subpoena power in connection with this type of investigation.

The legislative history of the Shipping Act of 1916 confirms our view that Congress authorized the use of the subpoena power in all investigations by the Commission pursuant to Section 22, whether the proceeding concerned a provision that in terms proscribed certain anticompetitive activity or was brought to determine whether certain activity should be disapproved. In general, the regulatory scheme established by the Act was patterned after that of the Interstate Commerce Act. Representative Alexander, the Act's sponsor, explained the meaning of Section 27 as follows:

> The provision of Section 27 relating to the power of the board [now the Commission] to compel the attendance of witnesses and the production of documents and other evidence are also substantially similar to those of the interstate commerce act, except that the board may exercise such power only "for the purpose of investigating alleged violations of the act" instead of "for the purpose of this act" as in the interstate commerce act. Under this broad phrase in the latter act as construed by the Supreme Court (Harriman v. United States, 211 U. S. 407 [1908]), the power of the board is limited to investigation of violations. 53 Cong. Rec. 8081 (1916).

The House Report on the Alexander Bill contains an almost identical explanation of Section 27. H. R. Rep. No. 659, 64th Cong., 1st Sess. 33 (1916). The Senate Report on the bill merely reproduced the House Committee comment. S. Rep. No. 689, 64th Cong., 1st Sess. 13 (1916). The much criticized decision in *Harriman* v. *United States*, 211 U. S.

407 (1908) is therefore important to an understanding of the Commission's Section 27 subpoena power.

In *Harriman* v. *United States, supra,* the Court was faced with determining the scope of the Interstate Commerce Commission's authority to compel a witness to testify before it. The Interstate Commerce Act authorized the ICC, either upon complaint or its own motion, to insure compliance with the provisions of the Act, like those prohibiting discrimination and poolings of freights, and those requiring charges be reasonable and rates be published. Consolidations and mergers, as such, were not then within the regulatory jurisdiction of the ICC; however, the Act did authorize the ICC to conduct investigations into the operation of interstate commerce in order that it might recommend additional legislation to the Congress. Pursuant to this latter authority, the ICC in 1906 commenced an investigation of railroad mergers and consolidations and it subpoenaed the president and chief executive officer of the Union Pacific Railroad to testify. The ICC contended its power of subpoena "for the purposes of this Act" empowered it to compel testimony in an investigation that was not brought to insure compliance with a regulatory provision but instead to further the ICC's statutory duty to recommend legislation to the Congress. 211 U. S. at 419. Justice Holmes, speaking for a majority of the Court, rejected the Commission's position, holding that ". . . the purposes of the act for which the commission may exact evidence embrace only complaints for violation of the act, and investigations by the commission upon matters that might have been made the object of complaints." *Ibid.*

Justice Holmes's reasoning in *Harriman* clarifies the Congressional attempts to explain Section 27 of the Shipping Act of 1916. Congress understood *Harriman* to have interpreted the provision of the Interstate Commerce Act that authorized the ICC to exercise subpoena power "for

the purposes of this act" so as to limit the ICC's subpoena power to "investigations of violations" and to "investigations upon matters that might have been made the object of complaint." Congress simply codified the *Harriman* interpretation when it used the language "for the purpose of investigating alleged violations," rather than "for the purposes of this act," to define the Federal Maritime Commission's Section 27 subpoena power. In the absence of any shred of evidence to the contrary, there is every reason to adopt the eminently reasonable conclusion that in so codifying *Harriman* Congress intended to vest the power of subpoena in the Commission in all those cases in which *Harriman* indicated that power was proper: that is in all cases where "complaints for violation of the act" were filed by private parties, or where an investigation was conducted by the Commission "upon matters that might have been made the object of complaint." In other words, Congress intended to authorize the use of the subpoena power in all investigations pursuant to Section 22 whether commenced upon complaint or on the Commission's own motion; and from the 1916 Act's inception, as we have seen, this included on the one hand investigations to determine whether a provision that in terms proscribes certain anticompetitive practices has been violated and, on the other, investigations commenced to further the Commission's responsibility to decide in light of broad criteria whether certain practices should be disapproved.

Our interpretation of the grant of authority to the Commission under Section 27 to exercise the power of subpoena "for the purpose of investigating alleged violations" of the Act renders nugatory respondents' contention that the Commission cannot exercise the subpoena power in a Section 18(b)(5) investigation because that Section does not provide, in terms, for investigations of "violations" but merely states that the Commission has the power to dis-

approve rates "which, after hearing, it finds to be so unreasonably high or low as to be detrimental to the commerce of the United States." Section 18(b)(5) was a provision contained in the 1961 Amendments to the Shipping Act of 1916. It authorizes the Commission to disapprove rates that fail to satisfy the broad criteria set forth in that Section, and is typical of the second of the three distinct types of regulatory provisions that the Shipping Act has contained since its inception. The legislative history of the Section indicates that the drafters of the statute intended it to codify administrative interpretations of Section 15, which had held that unreasonably high or low rates were "detrimental to the commerce of the United States in violation of Section 15 of the Act." E.g., 107 Cong. Rec. 18248-49 (1961) (remarks of Senator Kefauver). Investigations brought to enforce this type of regulatory provision are brought pursuant to Section 22 of the Act; they quite clearly concern matters that might have been made the object of complaint. It follows that, unless there is strong countervailing evidence of a contrary intent, Congress intended that the Commission could exercise its Section 27 subpoena power in furtherance of such investigations.

Respondents point out, however, that during the course of Congressional deliberations on the 1961 amendments to the Shipping Act a specific provision making it "unlawful" for a regulated carrier to reduce its rates unreasonably was considered and rejected and thereafter Section 18(b)(5) was enacted; they urge that this history proves that Congress in creating Section 18(b)(5) did not intend that it should be a provision that a regulated carrier could "violate." On the contrary, we believe Congress's choice to insure compliance with its normative command that rates be reasonable by means of the second rather than the first type of regulatory mechanism utilized in the Shipping

Act [24] simply reflects Congress's awareness that whether a certain rate is "unreasonable" is often a close question and that consequently a regulated carrier should be liable for Section 18's stiff penalties [25] only if it continue to charge unreasonable rates after the Commission has determined they are unreasonable.[26] Respondents also note that in 1961 Congress refused the Commission's request that its subpoena powers be expanded and consider this occurrence germane to our present inquiry. Although true, we fail to see its relevance. The Commission's request, which Congress denied, was a request for authority to engage in pre-hearing discovery, that is, to exercise subpoena power before the receipt of a complaint or the formal inception of an investigation upon the Commission's own motion. See H. R. Rep. No. 498, 87th Cong., 1st Sess. 22-25 (1961). The presence or absence of Commission power to subpoena in such circumstances is not at issue here.

To summarize, we hold that Section 27 of the Shipping Act of 1916 authorizes the Commission to exercise its power of subpoena during investigations commenced under Section 18(b)(5) and under provisions like Section 18(b)(5) that give the Commission power to disapprove certain practices in light of broad statutory criteria. It follows that the lower court's decision relating to items (3), (4), and (5) in the subpoenas issued in the present case must be reversed.

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[24] See text accompanying notes 15-18 *supra*.

[25] Section 18(b)(6) states that "Whoever violates any provision of this section shall be liable to a penalty of not more than $1,000 for each day such violation continues; to be recovered by the United States in a civil action." 46 U. S. C. § 817(b)(6).

[26] Of course the reasonableness of a rate is just as close a question irrespective of whether it is in foreign commerce or in interstate commerce. Congress presumably decided, however, that foreign carriers should be treated with special fairness and thus subjected foreign carriers to penalties only prospectively.

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III.

The remaining issue is one raised on the cross-appeal by all the respondents except Mordecai Chovers, and relates to the long delay between July 2, 1964, the date on which the underlying investigation into practices of the New York Freight Bureau (Hong Kong) was concluded and May 19, 1965, the date on which the Commission applied to the district court for an order to show cause why respondents should not be compelled to comply fully with the subpoenas issued by the Examiner. Respondents urge us to hold that this delay was unreasonable and that it bars relief. We agree that this aspect of the case appears to be further evidence of the snail-like pace of the administrative process of which this court has had many examples in the past. Nevertheless, much stands in the way of an adoption of the position urged by respondents. First, in every respect the subpoenas were "regularly made and duly issued." § 29, 46 U. S. C. § 828. Second, respondents do not indicate to us how they were prejudiced by this delay; we should think if anyone were prejudiced it would be the competing carriers not under investigation. Finally, the essence of the position urged by respondents is that laches bars the Commission from seeking the relief it seeks in this proceeding. This position is in direct conflict with the apparently well-settled rule that "the United States is exempt from statutes of limitations and the defense of laches unless Congress provides otherwise. . . ." *United States* v. *93 Court Corp.*, 350 F. 2d 386, 388 (2 Cir. 1965), *cert. denied*, 382 U. S. 984, 86 S. Ct. 560 (1966).

Therefore, we hold that despite this unfortunate delay the lower court's order that the respondents comply with items (1) and (2) of the subpoenas issued in connection with the underlying investigation in this prcoeeding was proper.

We remand to the district court and order that it enforce full compliance with the subpoena *duces tecum*.

FRIENDLY, *Circuit Judge* (concurring):

The precise issue on the Commission's appeal is whether § 27 of the Shipping Act, 46 U. S. C. § 826, authorizing it to issue subpoenas "for the purpose of investigating alleged violations" of the act, includes an investigation to determine whether a rate in foreign commerce is "so unreasonably high or low as to be detrimental to the commerce of the United States" and thus to require disapproval under § 18(b)(5) added in 1961, 46 U. S. C. § 817(b)(5). If the words are read in their natural meaning, the answer is in the affirmative and, as shown in Judge Waterman's thorough opinion, this becomes plainer still when we consider their source. Respondents' argument that by speaking of "violations" Congress meant to limit the subpoena power to cases where conduct might have given rise to a claim for past wrongs as distinguished from a future prohibition finds no basis in language, in history or in good sense. I therefore see no need for extended and perhaps debatable discussion of the framework of the Shipping Act or for deciding whether the subpoenas would have been valid under the legislation prior to 1961 as incidental to the Commission's powers under § 15, 46 U. S. C. § 814, to disapprove the conference agreement itself as operating to the detriment of the commerce of the United States—action which the Commission has not suggested here.